

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

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JOSE HERNANDEZ,

Plaintiff,

v.

INDYMAC BANK, et al.,

Defendants.

Case No. 2:12-cv-00369-MMD-CWH
Member Case: 2-13-cv001431-MMD-CWH

ORDER

I. SUMMARY

This action involves claims for declaratory and injunctive relief to prevent a mortgage foreclosure. Before the Court are the following motions: (1) Defendants OneWest Bank, F.S.B. ("OneWest") and Deutsche Bank National Trust Company, as Trustee of IndyMac INDX Mortgage Loan Trust 2005-AR9 Mortgage Pass-Through Certificate Series 2005-AR9's ("Deutsche") (collectively, "Defendants") Motion for Summary Judgment (ECF No. 136); and (2) Quality Loan Service Corporation's ("Quality Loan") Motion for Summary Judgment (ECF No. 131) and Request for Judicial Notice (ECF No. 133). Plaintiff has opposed (ECF Nos. 140, 141); and Defendants have replied to which Quality Loan joined (ECF Nos. 143, 144). For the reasons discussed below, both motions are granted.

II. BACKGROUND

A. Factual Background

The relevant undisputed facts are recited in the Court's earlier Order denying Defendants' motion for summary judgment. (ECF No. 94.) The Court reiterates the facts here for ease of reference.

1 Plaintiff Jose Hernandez purchased real property located at 3276 Costa Smeralda
2 Circle, Las Vegas, Nevada 89117 ("the Property") on or about August 6, 1997. (ECF No.
3 1 at 5-6.) Hernandez obtained a loan of \$780,000 ("the Loan") from IndyMac Bank, FSB
4 ("IndyMac") and executed a promissory note ("Note"), which was secured by a deed of
5 trust on the property ("the Deed of Trust"). (*Id.* at 6; ECF No. 73-1.) The Deed of Trust
6 names IndyMac as lender and designates Old Republic Title Company as trustee. (ECF
7 No. 73, Exh. A.) The Deed of Trust was recorded on September 3, 2003, in the official
8 records of Clark County, Nevada. (*Id.*) In October 2008, Hernandez defaulted on the
9 Note, and attempted to negotiate a loan modification in December 2008, without
10 success. (ECF No. 1 at 7.) Hernandez does not claim that he was current on his
11 payments. In fact, the Court found that Plaintiff stated at a hearing that "he has not paid
12 his mortgage since at least early 2009." (ECF No. 72 at 8.)

13 On May 4, 2007, IndyMac assigned the beneficial interest under both the Note
14 and Deed of Trust to Deutsche. (ECF No. 73-3.) The assignment was recorded on July
15 2, 2007. (*Id.*)

16 IndyMac's assets were later transferred to IndyMac Federal Bank, FSB ("IndyMac
17 Federal") in July 2008 under the direction of the FDIC. (ECF No. 1 at 6.)¹ Subsequently,
18 on March 19, 2009, all of IndyMac Federal's assets were transferred to OneWest. (ECF
19 No. 1 at 7.)² On December 2, 2009, OneWest also executed an assignment, purportedly
20 transferring the Note and Deed of Trust to Deutsche effective March 7, 2009.³ (ECF No.
21 40-2.) This assignment was recorded on December 8, 2009. (*Id.*)

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24 ¹See also Press Release, FDIC, FDIC Establishes IndyMac Federal Bank, FSB
25 as Successor to IndyMac Bank, F.S.B., Pasadena, California (July 11, 2008)
(<https://www.fdic.gov/news/news/press/2008/pr08056.html>) (last visited 8/11/14).

26 ²See also Press Release, FDIC, FDIC Closes Sale of Indymac Federal Bank,
27 Pasadena, California (March 19, 2009) (<https://www.fdic.gov/news/news/press/2009/pr09042.html>)
(last visited 8/11/14).

28 ³The Court notes that the effective date of this transfer pre-dates OneWest's
acquisition of IndyMac Federal's assets.

(ECF No. 46), but ultimately denied Plaintiff's Motion for a Preliminary Injunction, reasoning that Plaintiff had not established a likelihood of success on the merits. (ECF No. 56.) Plaintiff appealed this denial to the Ninth Circuit, which ultimately affirmed the Court's decision. (ECF No. 69.)

Plaintiff also filed a second suit in state court against Deutsche and Quality Loan. *Hernandez v. Deutsche Bank Nat'l Trust Co.*, No. 2:13-cv-01431-MMD-CWH. That case was removed and Judge Dorsey found "[t]he arguments raised by Plaintiff . . . [were] materially the same as those raised" in this matter. (ECF No. 73-2.). Plaintiff's separate lawsuit was ultimately consolidated with this case. (*Id.*)

Defendants then moved for summary judgment, arguing that the law of the case dictates judgment in their favor and that Plaintiff's allegations do not support any claim for relief. (ECF No. 73.) The Court rejected the law of the case argument and found that questions of material fact remain as to whether Quality Loan was authorized to initiate foreclosure proceedings. (ECF No. 94.)

Defendants and Quality have now moved for summary judgment, presenting the single issue of Quality Loan's authority to record the Notice of Default. (ECF Nos. 131, 136.) Quality Loan also filed a request for judicial notice in connection with its motion (ECF No. 133), which the Court grants.

III. DISCUSSION

A. Legal Standard

"The purpose of summary judgment is to avoid unnecessary trials when there is no dispute as to the facts before the court." *Nw. Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18 F.3d 1468, 1471 (9th Cir. 1994). The purpose of summary judgment is to avoid unnecessary trials when there is no dispute as to the facts before the court. *Nw. Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18 F.3d 1468, 1471 (9th Cir. 1994). Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); see *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). An issue is

1 “genuine” if there is a sufficient evidentiary basis on which a reasonable fact-finder could
2 find for the nonmoving party and a dispute is “material” if it could affect the outcome of
3 the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–49
4 (1986). Where reasonable minds could differ on the material facts at issue, however,
5 summary judgment is not appropriate. *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th
6 Cir. 1995). “The amount of evidence necessary to raise a genuine issue of material fact
7 is enough ‘to require a jury or judge to resolve the parties’ differing versions of the truth
8 at trial.’” *Aydin Corp. v. Loral Corp.*, 718 F.2d 897, 902 (9th Cir. 1983) (quoting *First Nat’l*
9 *Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288–89 (1968)). In evaluating a summary
10 judgment motion, a court views all facts and draws all inferences in the light most
11 favorable to the nonmoving party. *Kaiser Cement Corp. v. Fishbach & Moore, Inc.*, 793
12 F.2d 1100, 1103 (9th Cir. 1986).

13 The moving party bears the burden of showing that there are no genuine issues
14 of material fact. *Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 883 (9th Cir. 1982). “In
15 order to carry its burden of production, the moving party must either produce evidence
16 negating an essential element of the nonmoving party’s claim or defense or show that
17 the nonmoving party does not have enough evidence of an essential element to carry its
18 ultimate burden of persuasion at trial.” *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210
19 F.3d 1099, 1102 (9th Cir. 2000). Once the moving party satisfies Rule 56’s requirements,
20 the burden shifts to the party resisting the motion to “set forth specific facts showing that
21 there is a genuine issue for trial.” *Anderson*, 477 U.S. at 256. The nonmoving party “may
22 not rely on denials in the pleadings but must produce specific evidence, through
23 affidavits or admissible discovery material, to show that the dispute exists,” *Bhan v. NME*
24 *Hosps., Inc.*, 929 F.2d 1404, 1409 (9th Cir. 1991), and “must do more than simply show
25 that there is some metaphysical doubt as to the material facts.” *Orr v. Bank of Am.*, 285
26 F.3d 764, 783 (9th Cir. 2002) (internal quotation marks omitted). “The mere existence of
27 a scintilla of evidence in support of the plaintiff’s position will be insufficient.” *Anderson*,
28 477 U.S. at 252.

1 **B. Analysis**

2 Defendants and Quality Loan’s motions assert the same argument in seeking
 3 summary judgment — that Quality Loan was authorized to act as Deutsche’s agent at
 4 the time of the recording of the Notice of Default on March 10, 2009. (ECF Nos. 131,
 5 136.) In denying Defendants’ previous motion for summary judgment, the Court found
 6 that the Notice of Default states that Quality Loan was acting as “either the original
 7 trustee, the duly appointed substituted trustee, or acting as agent for the trustee or
 8 beneficiary under a Deed of Trust.”⁵ (ECF No 94 at 7.) The Court rejected Defendants’
 9 argument that Deutsche ratified Qualify Loan’s filing of the Notice of Default, and found that
 10 material issue of fact exists as to whether the agency relationship between Quality Loan and
 11 Deutsche existed at the time of Quality Loan’s filing of the Notice of Default. (*Id.* at 8-10.) If,
 12 as Defendants argue, the undisputed evidence shows that Quality Loan was authorized to
 13 act as Deutsche’s agent at the time Quality Loan recorded the Notice of Default, then the
 14 Notice of Default was not defective, thus resolving Plaintiff’s wrongful foreclosure action.⁶

15 The Court agrees with Defendants that the undisputed evidence shows that Quality
 16 Loan was authorized to act and did act as Deutsche’s agent when it recorded the Notice of
 17 Default. The Loan was subject to a pooling service agreement (“PSA”) dated May 1, 2005,
 18 where IndyMac assigned the beneficial interest under the Note and Deed of Trust to
 19 Deutsche, as Trustee. (ECF No. 136-1 at 4; ECF Nos. 136-4, 136-5.) Thus, at the time that
 20 Deutsche recorded the assignment of the Deed of Trust, Deutsche held the beneficial
 21 interest in the Loan. IndyMac, “and its successors in interest,” was appointed as the “Master
 22 Servicer” under the PSA. (ECF No. 136-4 at 31.) IndyMac’s assets were subsequently
 23 transferred to IndyMac Federal in July 2008 under the direction of the FDIC. (See
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25 ⁵At the time Quality Loan recorded the Notice of Default, Nevada law “required
 26 that the party filing the notice of default be an agent of the beneficiary.” See *O’Connor v.*
 27 *National Default Servicing Corp.*, No. 3:13-cv-00274-MMD-WGC, 2014 WL 558712, at *3
 (D. Nev. Feb. 10, 2014).

28 ⁶Plaintiff’s responses assert other factual disputes which are not material to this
 question. Accordingly, the Court will not address them.

1 discussion *supra* Sect. II(A).) On March 9, 2009, IndyMac Federal retained Quality Loan
2 to conduct the foreclosure sale.⁷ (ECF No. 136-1 at 5; ECF No. 133-8.) Quality Loan
3 recorded the Notice of Default the next day, on March 10, 2009. (ECF No. 73-4.) While
4 the Substitution of Trustee was not recorded until March 19, 2009, at the time Quality
5 Loan recorded the Notice of Default, it was “acting as agent for the trustee or beneficiary
6 under a Deed of Trust dated 8/27/2003” as represented on the Notice of Default. (*Id.*)
7 Based on the undisputed evidence, the Court agrees with Defendants that Quality Loan
8 was acting as Deutsche’s agent at the time it recorded the Notice of Default.
9 Accordingly, the Court will grant Defendants’ motions.

10 **IV. CONCLUSION**

11 The Court notes that the parties made several arguments and cited to several
12 cases not discussed above. The Court has reviewed these arguments and cases and
13 determines that they do not warrant discussion as they do not affect the outcome of the
14 two motions before the Court.

15 It is therefore ordered that Defendants’ Motion for Summary Judgment (ECF No.
16 136) and Quality Loan’s Motion for Summary Judgment and Request for Judicial Notice
17 (ECF Nos. 131, 133) are granted.

18 The Clerk is directed to enter judgment in defendants’ favor and close this case,
19 as well as the member case, No. 2-13-cv001431-MMD-CWH.

20 DATED THIS 29th day of September 2016.



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23 MIRANDA M. DU
UNITED STATES DISTRICT JUDGE

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27 ⁷The Substitution of Trustee is dated March 9, 2009. (ECF No 133-8 at 3.)
28 Defendants offered evidence to show that their servicing records reflect that Quality
Loan was retained as “attorney” to conduct the foreclosure on March 5, 2009. (ECF No.
136-9 at 2 (“F/C SETUP: 03-05-09”).)